IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 1312 OF 1980

The Cotton Corporation of India Ltd. having their registered office at Air India Building, 12 the floor, Nariman Point, Bombay-400 021. **.. Plaintiffs**

Versus

Madura Coats Private Ltd. having their registered office at New jail Road, Madurai 625 001 (South India) and also carrying on business at 15, Rajmahal 84, Veer Nariman Road, Bombay-400 020. **.. Defendants**

Mr. H.J. Thakker, Sr. Counsel with Mr. R.C. Shah & Mr. Mahajan i/b. Divekar & Co. for the Plaintiffs
Mr. B.R. Zaiwalla with Mr. Kotwal i/b. Mr. P. Rajmachikar for the Defendants

CORAM : S.R. SATHE,J.
DATED : 30/04/2007

ORAL JUDGEMENT :-

1. The Cotton Corporation of India, a Government of India undertaking has filed this suit against the company registered under the Company's Act for recovery of the amount of Rs. 2,61,26,182.37/- as damages

towards the loss suffered by the Plaintiffs as a result of the breach of the contract committed by the defendants.

2. The Plaintiffs' case in brief is that by circular dated 21/02/1977 All Indian Textile Mills, were informed that limited quantities of variety of imported cotton mentioned in the circular would be available for allocation and the interested mills should register their demands within specific period. In pursuance of the same, the Defendants by their telegram dated 14/3/77 offered to purchase 10,000 bales each of Brazilian and Mexican Cotton. However, the Textile Commissioner alloted to the Defendants only 805 bales of Mexican Cotton and 9000 bales of Brazilian Cotton. The said offer was accepted by the Defendants by their telegram dated 25/3/77. Prior to issue of above mentioned circular, Plaintiffs had entered into two contracts with the foreign supplier Viz. SANBRA of Brazil for purchase and import of large quantity of cotton of Grade colour and staple equal to type “Spisk” with an option to a supplier to deliver part or all equivalent out of Paraguayan growths. Plaintiffs sent

to the Defendants a contract bearing number G/389 dated 18/3/77 in duplicate duly signed by the Plaintiffs to enable the Defendants to return one copy duly signed by the Defendants. Accordingly, Defendants on 25/3/77 returned one copy duly signed by them. Thus, Plaintiffs agreed to import and deliver to the Defendants 805 bales of Mexican Cotton at the rate of Rs.5050/- per candy, May-June Shipment and 9000 bales of Brazilian Cotton at the rate of Rs.4975/- per candy, June-July shipment, alongwith some other stipulations. The Defendants also furnished requisite bank guarantee as asked by the Plaintiffs.

3. By the contract Number G/389, it was agreed that the contract entered into by the Plaintiffs with the foreign suppliers shall be an integral part of the said contract between Plaintiffs and the Defendants. It was also agreed that the price of the said goods shall be paid by the Defendants to Plaintiffs against tender of documents such as Bill of Lading, Insurance Policy, Invoice etc. The Defendants also agreed that they shall pay the carrying charges at the rate of 2 ½ % per 30 days from the date of arrival of the steamer, if

the Defendants fail to make payment and take delivery of goods on arrival. The Defendants also agreed to pay interest on the unpaid purchase price at the rate of 20% per annum on monthly rest basis.

4. Three consignments 648, 1000, and 6966 bales of type Spisk were shipped by the foreign supplier per S.S. Jalamayur and S.S. Jagdesh for Madras Port and the Defendants were informed by the Plaintiffs by their letters dated 15/7/77 and 2/8/77 to arrange to take delivery of the said goods and make payment for the same. The Defendants by their letter dated 12/8/77 informed that so far as 805 bales of Mexican Cotton contracted to be purchased, they would take delivery of 700 actual bales imported. So far as Brazilian cotton bales were concerned, the same were not from Brazil and were from Paragua as they would not take delivery of the same as a Paragua Cotton was not contracted and the same was not suitable for their requirements.

5. On 11/8/77 there was a meeting between Mr.V. Munikrishan,Deputy Manager of Plaintiffs and Mr.R.C. Doraiswami of the Defendants and it was pointed out by

the Plaintiffs that the import contract entered into by Plaintiffs was an integral part of the contract with the Defendants and as such Defendants were bound to take delivery of Paraguayan Cotton. The Defendants, however, by their letter dated 01/09/77 returned the Bills of exchange drawn on them for the price of the said cotton bales for cancellation. The Plaintiffs issued letter dated 3/9/77 and called upon the Defendants to make the payment. As the goods arrived at Madras Port, Plaintiffs were constrained to take delivery and store the same in Plaintiffs' godown.Even thereafter, Plaintiffs issued letter dated 20/3/78 to Defendants and called upon them to take delivery and informed that failing which they would be held responsible for all the loss that would be suffered by the Plaintiffs. The Defendants replied by their letter dated 2/5/78 and contended that Plaintiffs committed breach of the contract by importing cotton other than the cotton contracted and Defendants were not bound to take delivery of such cotton.

6. According to Plaintiffs goods imported viz. Paragua Cotton was not different in quality and type

from Brazilian Cotton. According to the Plaintiffs, clause No.26 of the contract between Plaintiffs and Defendants had no application and the Defendants were not entitled to cancel the contract on the ground that cotton imported was Paraguayan instead of Brazilian. The Defendants were entitled to cancel contract if quality or type of cotton would have been different. According to Plaintiffs, Defendants failed to take recourse to quality arbitration under clause 27 of the standard cotton through Plaintiffs. According to Plaintiffs, the Paraguayan cotton which was imported was sold by the Plaintiffs by private sale in different lots. However, in that transaction, they received amount less than the price of the said imported cotton and thus, sustained loss as shown in Ex.A attached to the plaint. Besides that, the Defendants were also liable to pay carrying charges and interest. So, after taking into consideration all these dues Plaintiffs filed the present suit for recovery of the amount of Rs.2,61,26,182.37/-against the Defendants.

7. The Defendants filed their written statement and admitted that they had received circular dated

21/2/77 from the Plaintiffs. As they were interested in importing cotton of Mexican and Brazilian varieties, they sent telex dated 5/3/77 and requested the Plaintiffs to book 10000 bales of Brazilian Cotton and 10000 bales of Mexican Cotton at the rates mentioned in the said circular and thereafter they received allotment letter dated 18/3/77 from the plaintiffs. It is the contention of the Defendants that they were not aware about the contract entered into by the Plaintiffs with foreign supplier prior to the said circular dated 21/2/77. The Defendants also admitted that they returned the contract bearing number G/389 dated 18/3/77 duly signed by them. However, according to them, while returning the said contract, they had specifically asked the Plaintiffs to provide copy of the import contract referred in clause 3 of the contract between Plaintiffs and Defendants. The Defendants contended that the said contract between Plaintiffs and foreign supplier was an integral part of the contract between Plaintiffs and Defendants. The Plaintiffs also did not inform them about the terms and conditions of the said contract. On the contrary, Plaintiffs neglected to supply copy asked by the

Defendants.

8. Defendants admitted that they received two shipping advises dated 15/7/77 and 2/8/77. However, the variety of the cotton mentioned therein was Brazilian (Paraguayan). When Defendants asked for the details of the bales, they were informed that 6966 bales of Paraguayan Cotton were shipped. According to Defendants, their representative Mr.Doraiswamy met Mr.Munikrishnan of the Plaintiffs and told that the cotton offered by the Plaintiffs was not the contracted cotton. Munikrishnan confirmed that Brazilian Cotton was offered but the shipper had an option to ship Brazilian or Paraguayan and as such the Defendants should accept the same. The Defendants, therefore, contended that the goods sent by the Plaintiffs were not of contracted variety and as such they were not bound to take delivery of the same. Hence, the Defendants issued letter dated 10/9/77 through their advocate to Plaintiffs and informed them that they committed breach of the contract and hence, Defendants rejected the goods and canceled the contract. The Defendants also contended that Plaintiffs supplied

totally different cotton than contracted and as such they were justified in rejecting the delivery. The Defendants specifically denied Plaintiffs' allegation that they committed breach of the agreement. They also contended the term of the contract between Plaintiffs and their supplier permitting the supplier to change the variety of cotton from Brazilian to Paraguayan or any other type can not be binding on the Defendants. They further contended that at the relevant time, Plaintiffs have entered into several contracts with several suppliers for supply of the Brazilian Cotton but the provision of interchangeability with other variety of cotton was not contained in any of the contract.

9. The Defendants also contended that Brazilian cotton was in fact available with the Plaintiffs at all material times for supply to the Defendants in fulfillment of the contract number G/389 and this is seen from the letter of the Plaintiffs dated 20/3/78.

10. As the Plaintiffs amended their plaint and gave details about damages, the Defendants filed their

supplementary written statement and contended that they were all along ready and willing to accept the delivery of the cotton which was contracted in contract G/389, but as the Brazilian Cotton was not offered as contracted, they refused to take delivery. Without prejudice to their contention in this behalf, the Defendants contended that Plaintiffs did not take adequate steps to mitigate the loss that they may have suffered after re-sale of the cotton imported by them. If at all Plaintiffs are entitled to damages, it should be based on the difference if any between contract price and the market price of the cotton contracted as on the date of the alleged breach. But the Plaintiffs have not formulated their claim on such basis and as such they are not entitled to get amount as claimed.

11. The Defendants submitted that the re-sale contract which Plaintiffs allegedly entered into with various companies indicate that the said contracts were not in respect of the Paraguayan Cotton but it was for "Paraguayan Raw Cotton equal to type Rover". Thus, from this also it is clear that cotton bales imported by the Plaintiffs were not cotton contracted for by the

Defendants and were not of type 'Spisk'. So on that count also Plaintiffs are not entitled to get any damages as alleged. Besides this, the Defendants contended that though they had informed the Plaintiffs about the cancellation of the contract, the Plaintiffs took steps for re-sale of the cotton in question after a period of about two years from the alleged date of breach of contract and thus, the Plaintiffs failed to make effort to mitigate damages or minimize loss and hence, on that count also Plaintiffs' claim is liable to be dismissed.

12. The Defendants denied the Plaintiffs' case that they were entitled to charge interest as claimed. According to Defendants, there was no such stipulation regarding interest in their contract and in any event, there was no stipulation regarding compounding of interest monthly. Hence, on all these grounds, the Defendants contended that they are not liable to pay any amount to Plaintiffs and the suit be dismissed with costs.

13. On the above pleadings this Court

(CORAM:A.B.PALKAR,J.) has framed the following issues. I have given my findings as mentioned against the same.

POINTS	FINDINGS
1. Whether the Plaintiff proves that the defendants committed breach of the contract by wrongfully cancelling the contract and not taking delivery of the suit cottons ?	**NO**
2. Whether the defendants prove that the defendants were justified in cancelling the contract as the goods imported by the Plaintiff was not of contract quality and type ?	**YES**
3. Whether the Plaintiff proves that the Plaintiff suffered loss of Rs. 2,73,50,781.40/- on account of the breach of contract committed by the defendant and are also entitled to interest thereon as claimed in the suit?	**DOES NOT ARISE**
4. What reliefs ?	**PLAINTIFFS ARE NOT ENTITLED TO GET ANY RELIEF**

14. In order to prove the suit claim Plaintiffs adduced evidence of two witnesses namely V.

Munikrishnan who was working as General Manager of the Plaintiffs at the relevant time and witness Anilkumar Jain, Accountant. As against this, defendants examined Mr. A.S. Bamrah who was then working as vice president, materials. Both the parties have produced several documents reference to which will be made in further discussion and and when necessary.

15. It is not in dispute that in the year 1976-77 Plaintiffs were working as canalising agent for import of foreign cotton of various varieties and types. Various textile mills in India used to place their requirement of foreign cotton with the Plaintiffs. Accordingly, on 21/02/1977 Plaintiff issued one circular whereby all the textile mills including the defendants were informed that limited quantities of 7 different varieties of imported cotton mentioned in the said circular are available for allocation at the rate indicated against each variety. It was also made clear that the said rates do not include letter of credit, bank charges and CCI service charges and mills have to arrange for clearance on arrival of the steamer. Mills desirous of importing the cotton mentioned in the

circular were asked to register their demands with Plaintiffs. It was also mentioned that the allocation would be communicated to the intending mills on the basis of supply available. In pursuance of the said circular, the defendants sent telex on 14/03/1977 to Plaintiffs and registered their demands of 10000 bales of Brazilian cotton and 10000 bales of Mexican cotton. On 18/03/1977, the Plaintiffs informed the defendants that 805 bales of Mexican Cotton and 9000 bales of Brazilian Cotton are allotted to them. It was also mentioned in the said letter that the above cotton is available for immediate contracting and shipment not later than 30/06/1977 and as such the defendants to take necessary steps. Admittedly, thereafter, contract No.G/389 (Exh-P6) was entered into between Plaintiffs and defendants on 18/03/1977 for the above mentioned 805 Mexican Bales and 9000 Brazilian Bales. Not only that but the Plaintiffs issued letter dated 25/03/1977 (Exh-P7) to the defendants and forwarded the duly signed contract No.G/389 and also mentioned that the Plaintiffs should sent the copy of the import contract Plaintiffs have entered into with foreign supplier, because in clause-3 of the said agreement it was

mentioned that the said import contract shall form an integral part of the contract between Plaintiffs and defendants. Admittedly, thereafter, copy of the said contract was at least not sent to defendants by post or through courier. It is also not in dispute that subsequently by letter dated 15/07/1977 the Plaintiffs informed the defendants that bale types spisk of Brazilian (Paraguayan) have been shipped per S.S. Jalmayur and S.S. Jagdesh. Immediately thereupon the defendants by their letter dated 12/08/1977 informed the Plaintiffs that they had specifically placed order for Brazilian cotton for specific end uses but they find that Paraguayan cotton has been shipped without any reference to them and clearance from them. Defendants also informed that Paraguayan Cotton is unsuitable to them in their requirement and as such 8614 bales of Paraguayan Cotton are not acceptable to them and Plaintiff should not send any shipping document in that behalf and defendants should be released from their obligation. It is an admitted fact that the defendants even returned the invoices received from Plaintiff and informed them to release them from the bank guarantee executed by them. Thus, the

defendants did not take the delivery of 8614 Paraguayan cotton bales.

16. It is Plaintiffs' case that defendants were not justified in refusing delivery of 8614 Paraguayan cotton bales and they committed breach of the contract No.G/389 and as a result of the same, Plaintiffs were ultimately required to sell the said bales. The defendants also did not pay carrying charges etc. and thus, Plaintiffs suffered loss of Rs.2,61,26,182.37/-. As against this, it is the contention of the defendants that as the goods sent were not as per the contract and the description, they were justified in refusing the same. Thus, the main and the material point to be decided in this suit is whether the defendants were justified in refusing delivery of 8614 Paraguayan Cotton bales and cancelling the contract.

ISSUE NOS. 1 AND 2

17. From the copy of the telex Exh-P4 it is very clear that the defendants had specifically demanded bales of Brazilian cotton and Mexican Cotton. In the instant case, bales of Mexican cotton which were

shipped and delivery by the Plaintiffs have been accepted by the defendants and there is absolutely no dispute about the same. The dispute is only in respect of bales of Brazilian Cotton. From the document Exh-P5 it is also evident that Plaintiffs had also specifically informed the defendants that Brazilian Cotton Bales 9000 in number have been allotted to them. Subsequent contract G/389 dated 18/03/1977 Exh-P6 also clearly goes to show that the contract was for Brazilian Cotton. So one thing is certain that in none of the above mentioned documents the defendants at any point of time made any reference to Paraguayan cotton and they had placed order for Brazilian Cotton.

18. It is pertinent to note that even the Plaintiffs also admit that the defendants had placed an order for Brazilian cotton but according to them, there was no breach on Plaintiffs part when they sent bales of Brazilian (Paraguayan cotton). Initially, the stand taken by the Plaintiffs and the argument that was advanced on behalf of the Plaintiffs was to the effect that Paraguayan Cotton and Brazilian Cotton are the same. Paraguayan cotton is cotton grown in Paragua and

it has the same qualities that of Brazilian cotton. So, the attempt of the Plaintiff was to show that there is no much difference in Brazilian cotton and Paraguayan cotton, perhaps Paraguayan Cotton is of a better quality, because admittedly, the rate of Paraguayan cotton is higher than the rate of Brazilian cotton. So, it is first necessary to find out whether Paraguayan cotton and Brazilian Cotton are different varieties or different types or not? While considering this question, one can safely rely on Plaintiffs' own document i.e. the circular (Exh-P3) dated 21/02/1977. In this circular, it is mentioned

"All Mills are hereby informed that limited quantities of the following varieties of imported cotton available for allocation, at rates indicated against each variety:

Variety	**Rate in Rs. Per Candy CIF Bombay/Bhavnagar/Cochin**
1.	.....
2.	.....
3. BRAZIL	Rs.4975/- June/July shipment
4.	.....
5.	.....

6. PARAGUA Rs.5025/- July shipment

7. ....

19. The Plaintiffs themselves have thus shown that Brazilian Cotton and Paraguayan cotton are separate. These are different types and varieties of cotton. Even Plaintiff's witness Munikrishnan has admitted in his cross-examination that Paraguayan cotton and Brazilian Cotton are shown as different varieties in circular Exh-P3. It is not a case that if in a open market Paragua Cotton is asked the Brazilian Cotton is given or vice versa, holding that both varieties or types are same. So, I have absolutely no hesitation to hold that Brazilian Cotton and Paraguayan Cotton are distinct and different types of cotton.

20. Now, the question arises, when defendants had specifically asked for Brazilian cotton and Plaintiffs had also allotted them that cotton, can Plaintiffs say that instead of Brazilian the defendants should take delivery of Paraguayan cotton. They are trying to make out such a case by relying on their import contract (P2) order S-1508 concluded on 19/02/1977. In this

contract it is mentioned :

" Commodity : South Brazilian cotton – Sellers option to deliver part/ all equivalent out of Paraguayan growths."

21. If we see the Contract between Plaintiffs and defendants which is at Exh-P6 there are two important stipulations with regard to point in question. The same are as under :

> "***(3)*** *The said Contract or agreement entered into by the Corporation with the Foreign Suppliers (hereinafter referred to as 'the Import Contract') shall form an integral part of this agreement and this agreement shall always be treated as subject to the terms and conditions of the said Import Contract.*
>
> ***(26)*** *In the event of the Foreign Suppliers supplying cotton of quality and type other than the quality and type of the cotton by this agreement agreed to be imported and sold, the mills will have the option either to accept such cotton under this agreement in substitution of the cotton contracted for or to cancel this agreement. In the event of acceptance of*

such cotton, all other terms and conditions of this agreement will remain in force. In the latter case the agreement will be cancelled without any consequences to any of the parties hereto."

22. It does appear that admittedly there is no specific evidence to show that the copy of the import contract mentioned in clause-3 above was supplied to the defendants. Plaintiffs' witness has stated that such copy was given to defendants' representative Bhamra. However, Bhamra has denied this. If really such copy would have been given, then, normally, Plaintiffs would have obtained signature of Bhamra for having received the copy of the import contract. But that has not happened. So, I am not inclined to hold that Plaintiffs have proved their case regarding the handing over the copy of the import contract to defendants. In my opinion, once it is admitted that defendants signed the contract and forwarded the same to the Plaintiffs then now it is in fact not open for them to contend that when they singed the contract G/389 they were not aware of the terms of Import Contract etc. Nobody had compelled them to sign the contract without first going

through Import Contract or without first knowing the terms and conditions of the Import Contract. Merely because after signing the contract and forwarding it to the Plaintiffs they asked for the copy of the Import contract, it can not be said that they had entered into contract with Plaintiffs subject to Plaintiffs forwarding the copy of Import Contract immediately. So, whatever is mentioned in Clause-3 of the Contract between Plaintiffs and Defendants has to be considered as part and parcel of the said contract and it is necessary to see what is the effect of the said contract and whether ultimately, Plaintiffs can justify their action by relying on the said clause.

23. There is one important hurdle in accepting Plaintiffs' case in this behalf. Admittedly, in suit contract between Plaintiffs and Defendants (Exh-P6) there is no specific mention of the date and number of import contract referred in clause No.3 of the suit contract. It only when the defendants made efforts and compelled Plaintiffs through Court to produce alleged import contracts. The Plaintiffs placed on record the Import Contract No.S/1507 dated 15/02/1977. In this

Contract, there is absolutely no mention regarding sellers option and the contract is in respect of South Brazilian Cotton. While all along attempt was made on behalf of Plaintiffs to rely on the Import Contract No.S-1508 dated 15/02/1977 wherein there is stipulation regarding sellers option. As both these contracts were entered into much prior to suit contract and allotment letter was also issued by the Plaintiffs to defendants allotting them 9000 bales of Brazilian Cotton. It must be held that at the relevant time the Plaintiffs were in fact having such number of Brazilian Cotton bales and now as they failed to supply Brazilian cotton as contracted the Plaintiffs are trying to take aid of Import Contract No. S-1508. So in the instant case, it has to be held that the Plaintiffs have not adduced reliable evidence to show that the condition in the Import Contract regarding sellers option was in fact applicable to the Defendants.

24. There is another very important stipulation in the Contract between Plaintiffs and Defendants which is mentioned at clause-26, which has been reproduced above. Firstly, it must be noted that this stipulation

is embodied at serial No.26 i.e. after stipulation No.3 regarding Import contract. What is more to be noted is that in Clause-26, there is specific mention regarding what should happen in the event of foreign supplier and not supplying the cotton required by the defendants. If we carefully read the wording of the above clause-26, any prudent person would also come to the conclusion that in view of the said specific stipulation choice or option is certainly given to the mills to reject the goods and cancel the contract if they are not desirous to accept the delivery of the cotton which was sent as substitution of the contract goods. So, this specific clause certainly overrides the stipulation in Import Contract in respect of the quality and type of goods. Reading the contract as a whole, I have absolutely no hesitation to hold that in the teeth of clause-26 it is not open for Plaintiffs to say that the option given by them to sellers was also binding on the mills that had placed order for specific type of cotton. If clause-26 would not have been there then applying the principles of doctrine of incorporation defendants would have been helpless. So, Plaintiff was not justified in saying that the sellers had not sent the goods required by the

defendants and hence the same were not supplied. So in the instant case, clause-3 of the agreement Exh-P6 does not help the Plaintiffs.

25. Incidently, it must be noted that the circular and Import Contract are for the period prior to the Contract between Plaintiffs and Defendants which is at Exh-P6. The fact that Plaintiffs wrote a letter to defendants dated 18/03/1977 and allotted 9000 Brazilian bales to them in fact, indicate that such bales were available with Plaintiffs or they had knowledge that they can provide such Brazilian bales to Plaintiffs.

26. As defendants had specifically asked for Brazilian cotton but the Plaintiffs sent different type and of different variety of cotton, the defendants were justified in rejecting the same by relying on clause-26. Besides this, learned Senior Counsel on behalf of the defendants argued before me that even as per the provisions of section-15 of the Sale of Goods Act, the defendants were fully justified in refusing the delivery of Paraguayan Cotton. In order to find out whether there is any substance in the argument it would

be worthwhile to see what section-15 of the Sale of Goods Act says. It runs as follows :-

> ***"15. Sale by description*** *- Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."*

27. It is well settled that where the goods are described by the Contract, and the buyer contracts in reliance of that description it is a sale by description. It applies to all cases where the purchaser has not seen the goods, but is relying on the descriptions alone. The principle of this section is an universal one. The condition as to description must be strictly fulfilled. In such contract of sale of goods if the seller fails to deliver goods that correspond with description then it has to be held that he has failed to perform contract and in such event the buyer is entitled to refuse to accept the goods. Ordinarily, where there is a dispute between a buyer and a seller

with reference to quality or type of goods, it would be the duty of the seller to prove that the goods were of the type contracted for. In the instant case, Plaintiffs have made an attempt to show that though they had sent Paraguayan cotton, it was similar to Brazilian Cotton and as such there was substantial compliance. But, at the cost of repetition, I must say that the Plaintiff has utterly failed to prove that Brazilian cotton and Paraguayan cotton are one and the same and it is proved that the Plaintiffs had failed to deliver the goods contracted for. So, as per the provisions of Section 37(3) of the Sale of Goods Act, the buyer is entitled to refuse such goods. The said section says :-

> ***"37. Delivery of wrong quantity -***
>
> *(1) .....*
>
> *(2) .....*
>
> *(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest or may reject the whole."*

28. In order to show that the contract in question is governed by section 15 and 37(3) of the Sale of Goods Act, the learned Senior Counsel for the defendants has placed reliance on a case **Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd., Madras State V/s, Radhelal Lalloolal and others AIR 1971 MADHYA PRADESH 191** wherein it has been held that when the contract for sale of goods by description is entered there is implied condition that the goods must correspond with the description and if it is not so, buyer can exercise his option under section 37(3) of the Sale of Goods Act.

29. As it was argued on behalf of the Plaintiffs that the goods offered i.e. Paraguayan Cotton were in fact of superior quality and as such the provision of section 15 of the Sale of Goods Act can not be applied, the learned Senior Counsel for the defendants submitted that the buyers are entitled to demand goods answering the description in the contract, and where the goods sent are not answering the said description the buyer

is not bound to accept the goods tendered merely because they were merchantable under that description. For this proposition reliance has been placed on a decision of House of Lords given in a case **ARCOS, LIMITED V/S. E.A. RONAASEN AND SON 1933 Appeal Cases 470**. In this case, it has been held that when the goods shipped are not in accordance with the implied condition that they should correspond with the description then buyer is entitled to reject it. The learned Senior Counsel for the defendants has also drawn my attention to a case **Phoenix Mills Ltd. V/s. Madhavdas Roopchand reported in Vol-XXIV of the Bombay Law Reporter at 142** wherein it is held that if the seller fails to deliver the goods within the time specified, then also the buyer has every reason to refuse the same. The reliance is also placed on a case **National Traders V/s. Hindustan Soap Work AIR 1959 Madras 112** wherein the Division Bench of Madras High Court observed that the expression "Description" in the phrase, "Sale by description" usually means a particular class of goods. It is a question of construction of contract of sale in any particular case

to find out whether it is a sale by description. In the instant case, admittedly sample of the cotton was not at all shown to the defendants. They were offered different types or varieties of cotton amongst which there were two types i.e. Brazilian and Paraguayan but the buyer had opted for Brazilian. Not only that but Plaintiffs had also initially issued allotment letter for 9000 bales of Brazilian cotton. So, the contract in question was certainly regarding sale of goods by description and as such the provisions of section 15 of the Sale of Goods Act are applicable.

30. My attention is also drawn by the learned Counsel for the defendants to a case **Prabh Dayal Kishen chand V/s. Hari Chand Sobha Ram AIR 1920 Lahore 352** wherein also it is held that buyer is entitled to refuse to take delivery of goods when they do not answer to the description in the Contract and is not liable to pay any damages which the vendor may have suffered on account of such refusal.

31. The learned Counsel for the defendants has also

laid his hands on a case **Nagardas Mathuradas V/s. N.V. Velmahomed reported in (1929) 33 BOM L.R. 454 (VOL : XXXII)** wherein it has been laid down that if the buyer ordered the goods of a certain description and seller delivered goods of different description it is open to the buyer to reject the same. So, taking into consideration the above cited various rulings and the facts of the present case it has to be held that in the instant case the defendants were fully justified in rejecting the goods i.e. cotton of Paraguayan type and the Plaintiffs had in fact committed breach by not delivering the cotton contracted by the defendants. So, I have answered issue Nos. 1 and 2 accordingly.

ISSUE NOS. 3 AND 4

32. Once it is held that defendants had not committed any breach of the contract but the Plaintiffs had in fact committed breach, there is no question of defendants paying any compensation or damages to the Plaintiffs. By exercising their rights which they had received under Clause-26 of the Contract and the rights

acquired by them as per the provisions of Law and in particular by section 15 and 37(3) of Sales of Goods Act, the defendants had communicated by letter dated 12/08/1977 Exh-P22 that they are not ready to accept the Paraguayan Cotton Bales numbering 8614 and that they have cancelled the contract. So, the Plaintiffs could have immediately put the said bales for sale but we find that they did not take any steps for sale for a period of about two years. The reason given by them that there was no response is too vague and can not be accepted. The fact is that they did not give any heed to the letter of the defendants. Subsequently, on 19/01/1978 at late stage they offered 2567 Brazilian bales. But as there was an inordinate delay the defendants rightly rejected the same. Incidently, it must be noted that Plaintiffs could not give any satisfactory explanation as to how and when they had received such Brazilian bales.

33. It has come on record that by the time Plaintiffs took steps for sale of the alleged Paraguayan cotton bales. After two years the said cotton had become yellow. Naturally, it fetched less

price. In order to show at what price the Plaintiffs sold the said cotton bales, they have placed reliance on invoices produced at Exh-P63 to 65 and 67 to 70. Latter three invoices are in fact in respect of sale of bales of Paragau cotton type Rover. This type of cotton bales were in fact not referred by the Plaintiff in the plaint so one does not know whether the cotton bales which were referred in the plaint were actually sold under the said invoices or not. It is contended on behalf of the defendants that if Plaintiffs would have taken proper steps to mitigate the loss then there would not have been such huge loss as alleged by the Plaintiff. According to defendants, failure on the part of Plaintiffs to mitigate the loss has dis-entitled them to claim damages as per section 73 of the Contract Act. For this purpose reliance has been placed on a case **M/s. BISMI ABDULLAH & SONS, MERCHANTS & COMMISSION AGENTS V/S. THE REGIONAL MANAGER, F.C.I. TRIVANDRUM AND ANOTHER AIR 1987 KERALA 56** wherein it is observed by the Division Bench that one of the fundamental principles of law of damages is that the person entitled to claim damages must do all that is within

his power to mitigate the damage and if there is failure to do so then at the most only nominal damages can be granted. The learned Counsel Mr. Thakker submitted that in the instant case the defendants are in fact not entitled to raise the point regarding failure on the part of the Plaintiff to mitigate the loss because the defendants have committed breach. In support of this proposition, he has placed reliance on a case **M. Lachia Shetty & Sons Ltd. V/s. The Coffee Board, Bangalore AIR 1981 Supreme Court 162.** In this ruling, Their Lordship of the Apex Court have observed that principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the Court while awarding damages. As in the instant case, I have already observed that the Plaintiffs have committed breach of the contract and not the defendants, the above cited rulings is of no help to the present Plaintiffs. So, in view of my findings on issue Nos.1 and 2, the Plaintiffs in the instant case are in fact not entitled to get any damages.

34. Incidently, it must be noted that in the instant case, the Plaintiffs did not take immediate steps to sale the good in spite of receiving letter of refusal from the defendants because Plaintiffs themselves were aware that the real fault was committed by them by not offering the goods of the quality and type and description that was contracted by the defendants. In fact, that is why we find that the Plaintiffs even did not encash the bank guarantee given by the defendants. While considering this aspect we do find that defendants in their letter dated 12/08/1977 had informed the Plaintiffs that they should release the defendants from their bank guarantee. So, non-encashment of the bank guarantee by the Plaintiffs also lends support to the defendants' version that the Plaintiffs committed breach of the contract in question.

35. There is another aspect of the matter. In the Contract in question Exh-P6, there is following stipulation No.30.

> *"**(30)** Subject to the provision of Clause (27) above, if any other dispute,*

difference or question shall arise between the parties hereto touching the construction meaning or effect of this agreement or the rights or liabilities of the parties hereto under this agreement or otherwise howsoever in relation to this agreement, vis-a-vis each other, then every such dispute difference of question shall be referred to arbitration and adjudication in accordance with the provisions of the Arbitration Act."

36. In view of the above stipulation, when defendants refused to take the delivery and according to Plaintiffs, defendants were not justified in doing so and as a result of the same, Plaintiffs sustained loss, it was necessary for the Plaintiffs to refer the dispute to the Arbitrator. In fact, Plaintiffs also admit that duty was cast upon the Plaintiffs to take such dispute to Arbitration. However according to them the defendants never requested the Plaintiffs to take the matter to Arbitration and as such they did not refer the issue to arbitration. However, I do not find any substance in this explanation of the Plaintiffs in not referring the matter for arbitration. When

according to Plaintiff, there was a dispute and they had an intention to sue the defendants for damages, it was necessary for the Plaintiffs first to refer the dispute for the arbitration on their own. Plaintiffs failure in that behalf, also now dis-entitles them to claim damages in the present suit.

37. In view of the above discussion, it is very clear that the Plaintiffs failed to supply the Brazilian type/ variety cotton as agreed to the defendants and thereby committed breach. They supplied goods of different type and variety and naturally, defendants rightly rejected the same. So, under such circumstances, Plaintiffs are not entitled to get relief as claimed in the plaint. Hence I pass the following order :-

O R D E R

The suit is dismissed with costs.

(S.R. SATHE,J.)